IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1184

E. I. MALONE, COMMISSIONER OF LABOR AND INDUSTRY FOR MINNESOTA,
Appellant,

v.

WHITE MOTOR CORPORATION AND WHITE FARM EQUIPMENT COMPANY,
Appellees.

On Appeal from the United States Court of Appeals for the Eighth Circuit

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MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

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MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Chamber of Commerce of the United States respectfully moves this Court, pursuant to Supreme Court Rule 42(3) for leave to file the accompanying

brief in this case as *amicus curiae* urging affirmance of the decision of the Court of Appeals. In support of this motion, the Chamber shows as follows:

1. This motion is necessitated by the refusal of the appellant to consent to the filing of a brief by the Chamber as *amicus curiae.*

2. The Chamber of Commerce of the United States of America is a federation consisting of a membership of over 3,700 state and local chambers of commerce and trade and professional associations, and a direct business membership in excess of 65,000. It is the largest association of business and professional organizations in the United States.

The Chamber regularly represents the interests of its member-employers in important labor relations matters vitally affecting those interests before the courts, the United States Congress, the Executive Branch and independent regulatory agencies of the federal government. Such representation constitutes a significant aspect of the Chamber's activities. Accordingly, the Chamber has sought to advance those interests in a wide spectrum of labor relations litigation.[1]

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[1] *E.g., Buffalo Forge Co.* v. *United Steelworkers of America,* 428 U.S. 397 (1976); *Connell Construction Co.* v. *Plumbers and Steamfitters Local Union No. 100,* 421 U.S. 616 (1975); *Gateway Coal Co.* v. *United Mine Workers of America,* 414 U.S. 368 (1974); *William E. Arnold Co.* v. *Carpenters District Council of Jacksonville,* 417 U.S. 12 (1974); *Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36 (1974); *Super Tire Engineering Co.* v. *Lloyd W. McCorkle,* 416 U.S. 115 (1974); *N.L.R.B.* v. *Bell Aerospace Co. Division of Textron, Inc.,* 416 U.S. 267 (1974); *Boys Markets* v. *Retail Clerks Union,* 398 U.S. 235 (1970); *N.L.R.B.* v. *Granite State Joint Board,* 409 U.S. 213 (1972); *N.L.R.B.* v. *Pittsburgh Plate Glass Co.,* 404 U.S. 157 (1971); *Booster Lodge No. 405, International Association of Machinists* v. *N.L.R.B.,* 412 U.S. 84 (1973).

3. The specific question presented by this case is whether the Court of Appeals for the Eighth Circuit correctly concluded that the federal labor policy encouraging free collective bargaining and embodied in the National Labor Relations Act (29 U.S.C. § 151, *et seq.*), preempts the Minnesota Private Pension Benefits Protection Act, Minn. Stat. §§ 181B.01-.17. The Minnesota Act mandates vested pension benefits for certain employees and full funding thereof even though their employer and union representative have bargained different benefits and certain limitations on the employer's liability for funding. The instant case thus presents a potential for a novel judicial precedent allowing states to legislate terms and conditions of employment over which employers and unions must otherwise bargain. Many members of the Chamber now bargain with unions; others may do so in the future. As such, they have an obvious concern with whether state legislatures may invalidate or substantively add to or detract from their bargained agreements. Further, they have similar concerns with whether state legislatures may mandate minimum or maximum employment conditions which will restrict the ability of employers and unions to determine those conditions which best meet the needs and desires of their employees; for, in addition to desiring conditions which will attract and retain a productive workforce, employers need the flexibility to meet employee desires in order to avoid strikes.

4. Accordingly, the instant case could create serious labor problems for Chamber members and could result in substantially increased employer costs for employment above those negotiated with unions if the Eighth Circuit's decision is not affirmed.

WHEREFORE, it is respectfully moved and requested that the Chamber of Commerce of the United States of America be granted leave to file the accompanying brief as *amicus curiae*.

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

INTEREST OF THE *AMICUS CURIAE*

A statement describing the Chamber of Commerce of the United States of America and its interest in

this case is set forth in the preceding motion requesting leave to file this *amicus curiae* brief.

SUMMARY OF ARGUMENT

The issue in this case is whether the federal policy favoring free collective bargaining preempts the authority of the various states to legislate on those subjects where the federal law requires bargaining—*i.e.*, wages, hours and conditions of employment. For the reasons set forth below, we believe the answer is "yes," that the states are so preempted generally and further that state legislation concerning the terms of pension plans (such as the Minnesota statute involved in this case) is likewise preempted because no reason exists to except pensions from the general rule.

Our discussion below is divided into two parts. First, because we believe that the Appellees have fully and accurately set forth the applicable statutory law and judicial precedent, we state briefly what we submit are the salient legal principles involved in this case. The second portion of this brief discusses why broad federal preemption of state laws affecting mandatory collective bargaining subjects makes sense in both theory and practice and, thus, why the arguments of the State and the National Labor Relations Board [2] should be rejected.[3]

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[2] The Board has filed a brief *amicus curiae* through the office of the Solicitor General, on behalf of the United States (hereinafter referred to as the "Board's Brief").

[3] This latter discussion is prompted in part by the State's expressed concern that the Eighth Circuit Court of Appeals did not analyze how the Minnesota law in issue interfered with bargaining or the substantive terms of a negotiated agreement (State's Brief at 24) and also by the Labor Board's apparent conclusion that state legislation of minimum employment standards does not substantially interfere with bargaining (Board's Brief at 9, 19-20).

ARGUMENT

A. Federal Labor Policy Favoring Free Collective Bargaining Generally Preempts State Legislation Dealing With Subjects Which Must Be Bargained Between Employers And Unions And Specifically Preempts The Minnesota Pension Act.

The general rule is that states may not intrude upon the federal policy favoring free collective bargaining by enacting statutes which establish minimum or maximum conditions of employment and, hence, limit the scope of bargaining. Thus, the overall scheme of the National Labor Relations Act is to provide the parties to bargaining with the freedom to bargain over employment terms and conditions and to thereby preclude the government (federal and state) from determining what those terms and conditions shall be (*e.g.*, *Local 76, International Association of Machinists and Aerospace Workers* v. *Wisconsin Employment Relations Comm'n.*, 427 U.S. 132 (1976); *H. K. Porter Co.* v. *N.L.R.B.*, 397 U.S. 99 (1970); *N.L.R.B.* v. *Insurance Agents' International Union*, 361 U.S. 477 (1960); *Local 24 of International Brotherhood of Teamsters* v. *Oliver*, 358 U.S. 283 (1959); *Hill* v. *Florida*, 325 U.S. 538 (1945)).

Indeed, in *Machinists, supra*, this Court started with that as a settled rule of law (established earlier in *Oliver, supra*, and *Insurance Agents', supra*), and proceeded from there to find that states were preempted from controlling the economic weapons avail-

able to bargainers because to allow such control would allow the states to indirectly influence the substantive terms upon which the parties might ultimately agree. If states cannot indirectly control the substance of bargaining, certainly they cannot directly control it.[4]

As with any general rule, however, there are exceptions—*i.e.*, areas where states may legislate notwithstanding the federal labor policy.[5] Although they may not be always separable, for ease of analysis we discuss below three separate exceptions urged by the State and Board.

First, states are not precluded from regulating in the area of labor relations where the regulated conduct touches "interests so deeply rooted in local feeling and responsibility that . . . we could not infer that

[4] The State argues that federal labor policy essentially precludes state interference with the "process" of bargaining rather than the substantive terms of a bargained agreement (*e.g.*, State's Brief at 16, 18). However, *Machinists, supra,* makes clear that such an argument must fail.

[5] In this brief we do not deal with the so-called *Garmon* areas of NLRB primary jurisdiction (those matters which are arguably protected or prohibited by the NLRA) (*San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236 (1959)). As in *Machinists,* the *Garmon* analysis is not relevant here, for the Minnesota Pension Act does not touch upon conduct prohibited or protected by the NLRB. Rather, the relevant area of inquiry in this case is whether pension benefits, a mandatory subject of bargaining, were intended by Congress to be left unregulated and under the control only of the parties in bargaining (*Machinists, supra* at 140). The State's argument (State's Brief at 17-19) that any matter not arguably protected or prohibited is "peripheral" to the central aim of the NLRA, and thus not preempted, has therefore been foreclosed by *Machinists, supra.*

Congress had deprived the States of the power to act." (*Machinists, supra* at 136 (quoting *Garmon, supra* note 5, at 244)). The State and the Board attempt to argue that this exception may apply in this case, for the State of Minnesota has merely exercised its traditional police power to prescribe minimum standards for the welfare of its citizens.[6]

It is sufficient to point out, however, as did this Court in *Machinists,* that this exception applies to the normal police powers of the state in the handling of labor violence, mass picketing, intimidation, blocking of ingress and egress, etc. (*Machinists, supra* at 136, n. 2). The exception clearly does not include the right of states to legislate employment conditions, even when such legislation may be an attempt to promote the general health and welfare of the state's population.[7] Indeed, if this exception in-

[6] *E.g.*, State's Brief at 15, 40-44; Board's Brief at 9, 10-12, 16-17.

[7] For example, even where the general welfare of the entire population is at stake, state legislation prohibiting strikes of public utilities or hospitals is preempted by the national labor policy protecting the right to strike (*Amalgamated Association of Street, Electric Railway and Motor Coach Employees* v. *Wisconsin Employment Relations Bd.*, 340 U.S. 383 (1951); *N.L.R.B.* v. *Committee of Interns,* —— F.2d ——, 96 LRRM 2342 (2d Cir. 1977)). And if this Court was correct in *Machinists, supra,* when it held that the weapons of bargainers (*e.g.*, strikes) could not be controlled by a state because that would lead to indirect control of the substance of bargaining, then *a fortiori* no state may directly control bargaining subjects under the guise of exercising its police power in the interests of health and welfare of its citizens, unless, of course, as we have indicated, such control falls within the exception for "interests . . . deeply rooted in local feeling and responsi-

cluded that right, the exception would swallow the rule. For all manner of state regulation of wages, hours, and other terms and conditions of employment could be justified under the state's authority to enact general welfare legislation.

The second exception allowing states to legislate on matters which might otherwise be preempted by the federal labor policy favoring bargaining is that which allows the states the "power to regulate where the activity regulated [is] a merely peripheral concern of the Labor Management Relations Act." (*Machinists*, *supra* at 137 (citing *Garmon*, *supra* note 5, at 243)).[8]

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bility . . . ." Examples of such interests may be specific health and safety matters in the workplace (*e.g.*, *Oliver*, *supra* at 297), although even here the impact on bargaining subjects may be slight for the question of who shall pay the cost of safety equipment may remain open for bargaining (*see*, *e.g.*, *Budd Co.* v. *Occupational Safety & Health Rev. Comm'n.*, 513 F.2d 201 (3d Cir. 1975). In any event, this latter category of "interests" certainly does not include pensions.

[8] It is not clear that the Board argues this exception here. The Board quotes from the District Court opinion to the effect that the Minnesota Act did not "regulate conduct so plainly within the central aim of federal regulation . . ." (Board's Brief at 6), but it does not appear that the Board adopts that argument. The Board at page 16, footnote 15 of its brief does cite cases for the proposition that the creation of pension trusts, the interpretation of trust language and the administration of such trusts are matters of peripheral concern to the NLRA. However, those cases do not deal with state mandated benefits and thus are not relevant to the issue now before this Court.

The State, however, does make this peripheral concern argument. First, it contends that unprotected and unprohibited activities are peripheral to the NLRA scheme. That argu-

However, this exception does not apply to the issue before this Court. Thus, pensions and the various provisions of a pension plan are clearly mandatory bargaining subjects under the NLRA (*Inland Steel*, *supra* note 8). As such, pension plans and benefits and their terms cannot in any sense be peripheral to the concerns of federal labor policy, for they are the direct concern of that policy which requires free and unfettered bargaining as to those very matters. Pension plans and benefits fall as plainly within the NLRA bargaining policy as do lease agreements entered into by truck drivers which set forth a union negotiated minimum rental intended to protect negotiated wage rates. The latter are not peripheral to the concerns of the Labor Act because they are mandatory bargaining subjects (*Oliver*,

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ment must fail (*see* note 5, *supra*). Next, the State seems to argue that because its statute only affects pension benefits when an employer goes out of business or terminates its pension plan, the statute merely regulates matters of peripheral concern to the Labor Act (*e.g.*, State's Brief at 18-19, 21-22). This argument has no validity, for it makes no difference whether benefits are payable prior to or upon termination of employment. The employer is still obligated to bargain with respect to such benefits. Matters such as severance pay and retirement benefits are not only mandatory bargaining subjects, but also standard items in the usual collective bargaining contract (*Wiley & Sons* v. *Livingston*, 376 U.S. 543, 554 (1964); *Inland Steel Co.* v. *N.L.R.B.*, 170 F.2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949); *N.L.R.B.* v. *Royal Plating and Polishing Co.*, 350 F.2d 191, 196 (3d Cir. 1965)). Pressed to its logical conclusion, the State's argument would make all of these matters subject to state regulation because they all are connected with termination of employment and, therefore, under the State's theory, would be deemed peripheral.

supra). Then certainly pensions and their various provisions cannot be of peripheral concern.[9]

In sum, the first two exceptions do not allow states to set maximum or minimum levels on mandatory bargaining subjects such as pensions.[10] To the extent that these subjects may be controlled, it must be through the third exception to the doctrine of federal labor policy preemption.

The third exception to the general rule of preemption, and indeed, the only one granting states the right to legislate wages, hours or conditions of employment (other than perhaps health and safety conditions), allows the states to legislate on mandatory bargaining subjects when Congress has granted them the right to do so. Thus, this Court in *Algoma Plywood & Veneer Co.* v. *Wisconsin Employment Relations Bd.*, 336 U.S. 301, 312 (1949) indicated that although the general rule of federal preemption

[9] Significantly, this Court in *Machinists* set forth examples of matters of peripheral concern, none of which dealt with mandatory bargaining subjects (427 U.S. at 137, n. 3).

[10] Justice Powell's concurring opinion in *Machinists* (427 U.S. at 156) reflects that view. He reads the Court's opinion as not precluding "the States from enforcing, in the context of a labor dispute, 'neutral' state statutes or rules of decision: state laws that are not directed toward altering the bargaining positions of employers or unions but which may have an incidental effect on relative bargaining strength . . . for example, their law of torts or of contracts, and other laws reflecting neutral public policy." The Minnesota Pension Act, however, is not a "neutral" state statute having only an incidental effect on relative bargaining strength. Instead, it directly impinges on the substantive aspects of the sort of pension plan to which unions and employers may agree.

required that Congress "manifest an unambiguous purpose" that state law be supplanted, a different approach was required under the NLRA because Congress, by guaranteeing free collective bargaining, foreclosed the states from interfering with the subjects of bargaining. This Court clearly reaffirmed that approach in *Oliver*, *supra* at 297: "If there is to be this sort of limitation [the Ohio antitrust statute] on the arrangements that unions and employers may make with regard to these subjects [wages and truck rental fees], pursuant to the collective bargaining provisions of the Wagner and Taft-Hartley Acts, it is for Congress, not the States, to provide it." *See also*, *id.* at 296 & n. 10.[11]

The Board argues just the opposite on this issue, that is that states have the existing right to legislate minimum employment standards unless Congress has specifically displaced that right.[12] The Board states,

[11] As this Court said in *Amalgamated*, *supra* note 7, at 397-98:

> [C]ongress demonstrated that it knew how to cede jurisdiction to the states. Congress knew full well that its labor legislation "preempts the field that the act covers in so far as commerce within the meaning of the act is concerned" and demonstrated its ability to spell out with particularity those areas in which it desired state regulation to be operative. This Court, in the exercise of its judicial function, must take the comprehensive and valid federal legislation as enacted and declare invalid state regulation which impinges on that legislation. (Footnotes omitted).

[12] *E.g.*, Board's Brief at 9 (the Disclosure Act of 1958 "reserved to the states the responsibility for regulating the operations of pension plans"); at 10 ("an 'intention of Congress to exclude States from exerting their police power must be

for instance, that because "Congress, in enacting the NLRA, made no effort to set minimum standards for the health, safety or welfare of employees; there is thus no basis for inferring that Congress has displaced the state's preexisting authority to do so." (Board's Brief at 11, n. 10).[13] The Board's position again overargues the case.

Thus, the NLRA sets no minimum standards in any areas where bargaining is required and, indeed, does not mention any specific bargaining subjects.

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clearly manifested' "); at 12 ("Congress intended that matters of pension regulation be left to the states"); at 16 ("clearly manifested" again); at 17 ("Congress intended to preserve the power of the states to regulate pension plans").

[13] The Board's statement seems at odds with earlier arguments it has presented to this Court. Thus, in its brief on behalf of the United States in *Amalgamated, supra* note 7, the Board stated at 49-50:

> Had Congress intended to permit the states to apply to industries within their borders measures which it had rejected it would clearly have provided for reservation of such power to the states. Congress realized that "by the Labor Act Congress preempts the field that the act covers insofar as commerce within the meaning of the act is concerned" (H. Rep. No. 245, on H.R. 3020, p. 44), and consequently it took care to preserve to the states whatever jurisdiction it desired to permit them to retain. See Section 10(a). Section 14(b), which expressly reserves to the states power to prohibit the execution or application of agreements requiring membership in a labor organization as a condition of employment, was enacted because Congress believed that such a "special provision" was necessary "to give to the States a concurrent jurisdiction in respect of closed-shop and other union-security arrangements" (H. Rep. No. 245, on H.R. 3020, 80th Cong., 1st Sess., p. 40).

But Congress' failure to mention specific subjects, including pensions, has not deterred the Board and courts from determining that pensions must be bargained (*e.g., Inland Steel, supra* note 8) or that the states may not regulate in those areas absent authorization by Congress (*e.g., Machinists, supra*). Further, if the Board is correct and the states have a general right to legislate terms of employment under their general preexisting powers, then the exception again engulfs the rule.[14]

The State, however, argues that Congress expressed an intent to allow the states to control the substance of pension plans via its enactment of the Welfare and Pension Plan Disclosure Act of 1958 (72 Stat. 997) and that this intent was made clear in the legislative history surrounding the enactment of ERISA (29 U.S.C. §§ 1001, *et seq.*).[15]

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[14] The Board tries to deal with this problem by contending that the states may set minimum standards—but not maximums—for that will leave the parties free to bargain above those minimums. (*E.g.*, Board's Brief at 19). However, if the states have the power to legislate minimums in the interests of public welfare, they must have the right to legislate maximums in the public interest. Further, even legislation of minimums in some areas of bargaining must have a restrictive influence on other areas. For example, if a state legislated minimum four week vacations for all employees, employers may not be able to afford free lunches, long coffee breaks or increased wages which employees might rather have. Thus, the legislation of "minimum" standards impermissibly interferes with the ability of unions and employers to freely order their own terms of employment—and such an interference is contrary to the national policy in favor of free collective bargaining (*See* our discussion, *infra*).

[15] State's Brief at 15, 29-39.

We would add but three comments to the Appellees' discussion of this issue,[16] which we believe demonstrates there was no such congressional intent.

First, just as the general preemption rule requires Congress to "manifest an unambiguous purpose" that state law be preempted (*Algoma, supra* at 312; *Oliver, supra* at 297), so too, where Congress has generally preempted the field of state regulation over collective bargaining subjects, as it has under the NLRA, it must clearly state an unambiguous intent to reopen any portion of that field for state regulation (*Amalgamated, supra* note 7, at 397-98). We submit that neither the State nor the Board has shown such an unambiguous congressional intent in the pension area.[17]

Second, if Congress intended control of substantive pension terms to be left to the states, then even state law setting maximum limits on benefits or even outlawing privately bargained pension plans would not be preempted by federal labor policy. We submit that Congress never evidenced any such intent.

Finally, the State argues that the enactment of ERISA, which sets certain minimum substantive standards for pensions, establishes that Congress sees

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[16] Appellee's Brief, *Argument,* IV at 32-40.

[17] Compare the State's arguments under the WPPDA with specific congressional determinations in favor of state control of bargaining subjects under 29 U.S.C. § 164(b) (allowing state "right to work" laws), 29 U.S.C. § 218 (granting states the right to set higher minimum wages and lower maximum hours of work per week than those established under the Fair Labor Standards Act) and 29 U.S.C. § 667 (allowing states to deal with occupational safety and health matters).

no tension between such legislation (including the Minnesota law) and the national policy of free collective bargaining (State's Brief at 35-39). On the contrary, it is far more reasonable to conclude that Congress saw the tension but enacted ERISA anyway because it felt the need to protect employee pensions. Further, even if Congress' action did indicate its belief that it could enact pension legislation with only minimal impact on the policy of free bargaining, that does not mean that the states were free to try their own hands at drafting such legislation, particularly where, as here, the state statute antedated the pertinent federal statute (ERISA).[18]

In sum, the Minnesota law is preempted by the national policy favoring free and unfettered collective bargaining. Not only is that conclusion supported by the case law, but also, as we show below, there are sound policy and practical reasons why this Court should continue to support a broad preemption of state laws which seek to control subjects over which employers and unions must bargain—wages, hours and conditions of employment.

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[18] *See Connell, supra* note 1 at 636, where the Court held that although federal antitrust statutes could stand with the federal labor policy, similar state laws could not. This holding, based upon a possible failure of states to fully appreciate and accommodate the need for a delicate balance between labor and antitrust policy, is particularly relevant in the pension field where ERISA was enacted by Congress with a similar delicate balance between labor policy and pension policy in mind (Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, Legislative History of the Employee Retirement Income Security Act of 1974 (Three Volumes, 1976) ("ERISA Leg. Hist."), Vol. III at 4707).

B. Sound Practical And Policy Considerations Support The Conclusion That Federal Labor Policy Preempts State Regulation Of Mandatory Bargaining Subjects, Including Pensions.

We have attempted to show above that the several states are not generally free to legislate specific terms and conditions of employment (including pension terms) for employees within their states, for to hold otherwise would thwart the national policy in favor of free collective bargaining. We summarize below why that policy developed and why it is important to this nation in general, and bargaining employers and unions specifically.[19]

Congress enacted the National Labor Relations Act in an effort to control the disruptive effects on commerce of strikes resulting from employee unrest. The basic theory, which years of experience have proven to be correct, is that if employees have a "say" in their own wages, hours and working conditions, and at the same time have the power to make that "say" meaningful through the collective power to withhold their labor, there will be less employee frustration and unrest, and thus, fewer strikes and commercial disruptions will occur (*e.g.*, *Amalgamated*, *supra* note 7, at 397). In order for that theory to continue to work in practice, it is essential that the parties to bargaining be left as free as possible to work out employment terms which make sense to them. Thus, our national policy in favor of free and unfettered private bargaining has worked well

[19] Policy considerations and practical experience have played an important role in this Court's consideration of preemption issues (*Amalgamated Association of Street, Electric Railway and Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 291 (1971).

because governments (both state and federal) have not generally played a role in setting or regulating substantive employment terms.

The State and Board seem to argue, however, that the extent to which Minnesota law impacts on bargaining is slight and, accordingly, should not be preempted by federal labor policy. Thus, the State argues that its law merely requires an employer to pay retirement benefits, and then only at the end of employment (State's Brief at 18-19). The Board argues that the State law has merely set minimum standards which do not disrupt bargaining much because parties are free to bargain above those minimums (Board's Brief at 19). Both arguments take a piecemeal approach to the bargaining process and thus ignore the basic nature of bargaining, *i.e.*, bargaining is a series of trades. Bargainers come to the table with many demands and proposals, normally with no realistic expectation of gaining all they demand. Wage demands are decreased in exchange for pension coverage, the demand for more paid vacation time is reduced to pay for more holidays, shift premium pay is cut back in exchange for increased coffee breaks, ets. Accordingly, to isolate one benefit and mandate a minimum payment is unrealistic, for that mandated payment must come from some other benefit or wage proposal.[20]

[20] The positions of the State and Board must assume that employers have infinite financial resources and that, accordingly, the cost of legislated minimum standards in one area will not result in decreases in other employment terms or benefits. That is not the case generally and most certainly was not true in the case of White which closed its plant after losses of $21 million over a three-year period (Appendix, p. 27).

Perhaps the best way to illustrate the lack of soundness in the piecemeal approach is to assume that the Minnesota law had been in effect prior to White's predecessor's first agreement upon a pension plan. This approach, of course, eliminates from consideration the appalling interference with the agreement negotiated between the UAW and White resulting in an increased cost to White of over $19 million above its bargain, but it does illustrate the impact of the Minnesota law upon bargaining.[21]

If the law had been in effect in 1950, would White's predecessor have established a pension in the first place? Certainly the costs would have been greater than they were, for to avoid liability that plan would have had to be fully funded. If a fully funded plan had been agreed upon, what effect would that have had on other employee benefits? Would employees have received less wages, shorter vacations, fewer holidays, etc.? The UAW may have preferred a plan funded over a longer period of time in order to reduce costs and, thus, secure higher hourly wages—but the state statute would have foreclosed, or at least interfered with, that option. Thus, the union and White's employees could have been faced with an all or nothing choice—accept an expensive fully funded pension and lower wages or receive higher pay but no pension. It is at least possible, if not likely, that the employees

[21] Because the Minnesota law may now be preempted by ERISA, the consequences set forth above may not occur in the future, but they do illustrate the unrealistic nature of the State's and Board's analysis.

would have opted for no pension at all,[22] in which case White and the State would never have become involved in the litigation now before this Court.

These examples can be multiplied, producing endless permutations and tradeoffs. But the point is clear, no one benefit exists in a vacuum, so that a legislated minimum on one term of employment affects all others being bargained and may even result in no agreement on the benefit to which the minimum standard applies. Just as the power to tax involves the power to destroy, so also the power to set minimum employment standards on only one bargaining subject involves the power to regulate bargaining on all terms and conditions of employment.[23] In sum, the word "minimum" is no magic talisman.

Further, the rationale of the Board and State cannot be limited to authorizing state legislation of minimum standards only. Thus, if a state, in the interest

[22] The House Ways and Means Committee pointed out in its report on ERISA legislation that the willingness of "those employees who are covered under a collective bargaining agreement [to] choose nonpension benefits, or nonpension benefits plus pension benefits at a lower level than those provided nonunion employees" had actually created a problem in establishing pension plans for nonunion employees (ERISA Leg. Hist., Vol. II at 3168).

[23] States have been denied the power to control the economic weapons of bargainers because that control may have an indirect impact on the substantive terms of a resulting agreement (*Machinists, supra*). Accordingly, it is even more certain that the states may not be allowed the power to set minimum substantive standards on even one employment condition, for that will directly affect bargaining on all other conditions.

of public welfare, legislates maximum employment standards, parties would still be free to bargain up to those maximums. For example, a state interested in attracting industry for the betterment of all its citizens might decree a maximum per hour wage rate, thus frustrating the ability of any union or employer to bargain more. And if a state can so act, why not its subdivisions—counties, cities, towns and villages?

In sum, state legislation of minimum or maximum employment standards has to restrict bargaining, all to the detriment of a free collective bargaining system which has well served this nation.

In addition to the foregoing more obvious consequences of a failure to affirm the Eighth Circuit's judgment in this case, a few additional examples reinforce the conclusion that the Circuit Court was correct.

Assume that states are to be granted the right to legislate employment standards and only minimum standards at that. If some states legislate minimum vacations for all employees, minimum paid rest periods, minimum employee workforce sizes, etc., and others do not, it is at least possible that some employers will gravitate to those states less inclined to legislate minimums. Indeed, the Board has earlier informed this Court that to so encourage employers is "contrary to sound economic and social policy" (Brief for the United States as *amicus curiae*, pp. 22-23 in *Linn* v. *United Plant Guard Workers, Local 114*, 383 U.S. 53 (1966).

Further, state legislated minimum standards could have an adverse impact on multi-employer bargaining involving business locations in various states. Normally such bargaining seeks common agreements on all or most bargaining subjects and incorporates those agreements into a common document. Congress and the courts have recognized the value of this common approach, because it achieves industrial peace in one step and avoids the waste of bargaining for the same things in hundreds of individual locations.[24] Further, Congress has recognized that to prohibit such bargaining could create situations where employees in each unit would seek benefits at least equal to those bargaining in all other units, and this leapfrogging could result in "an epidemic of strikes throughout the various units of the industry." [25]

But if the various states are allowed to set varying minimum standards, such bargaining will become more difficult, if not impossible. Thus, although we are dealing in this case with but one intrusion into the bargaining process (pension vesting and funding), minimum standard setting by the fifty states could result in hundreds of different standards nationwide (*e.g.*, vacations, breaks, holidays, parking, grievance procedures, no-strike clauses, management rights clauses, seniority, layoff, leaves of absence, cafeteria food prices, transportation to and from work, shift premiums, etc.). If a multi-employer bargainer dealing with locations in all those states cannot afford to agree to all those benefits in all states, or if the state

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[24] *E.g.*, *N.L.R.B.* v. *Truck Drivers Local 449*, 353 U.S. 87, 95 (1957); NLRB, Legislative History of the Labor Management Relations Act, 1947, Vol. I at 468-69, 716-17 (1948) ("LMRA Leg. Hist.").

[25] LMRA Leg. Hist., Vol. I at 468-69.

minimums conflict with one another,[26] tradeoffs state-by-state will have to be made. And the result will be that what had been a single agreement will become a hodge-podge of hundreds of special provisions. Further, the very problem of leapfrogging which concerned the Congress would be built into multi-employer bargaining, for each state minimum could become the bargaining goal in all other states.

There is no need to belabor the point. Failure to affirm the Eighth Circuit's judgment will affect collective bargaining and will restrict the flexibility of the parties to determine the conditions of employment which best meet their needs and desires. Moreover, reversal of the Eighth Circuit may open the door to legislative action on behalf of employees to gain for them what they failed to receive at the bargaining table. Indeed, the Minnesota legislature in this case did just that. Certainly such action erodes confidence in, and thereby inferences with, collective bargaining. Further, in those instances where legislation is enacted, it cannot serve the long-term interests of employees, employers and the nation. For no legislature can mandate minimum employment conditions which will fit the needs of all employers and employees in its state. On the other hand, as we have shown, legislated minimum conditions restrict bargaining flexibility on all bargaining subjects with the result that employees begin to lose the ability to have an effective "say" in the setting of their employment conditions. That, in the judg-

[26] One state might require employer paid bus transportation to cut down automobile travel and another might require employer paid automobile parking within a five-minute walk of the plant.

ment of Congress, leads to employee unrest and strikes triggered by frustration—which brings us back to where we started this discussion and where this nation started in 1935 before the Wagner Act was passed.

CONCLUSION

For all the foregoing reasons, the judgment of the Eighth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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